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In the

# Supreme Court of the United States

ABIGAIL NOEL FISHER,

*Petitioner*,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

## BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
*Counsel of Record*
ANTHONY T. CASO
CRISTEN A. WOHLGEMUTH
Center for Constitutional Jurisprudence
c/o Chapman University
Dale E. Fowler School of Law
One University Drive
Orange, CA 92886
(877) 855-3330
jeastman@chapman.edu

*Counsel for Amicus Curiae*
*California Association of Scholars*

## QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under the Equal Protection Clause of the Fourteenth Amendment and this Court's decisions interpreting that clause, especially *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), and whether the Court should develop evidentiary presumptions to help plaintiffs smoke out the pretextual use of the diversity rationale for race-preferential admissions.

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## INTEREST OF AMICUS CURIAE[1]

The California Association of Scholars ("CAS") is an organization devoted to higher education reform. An affiliate of the National Association of Scholars ("NAS"), it is composed of professors, graduate students, college administrators, trustees and independent scholars committed to rational discourse as the foundation of academic life in a free and democratic society. Its board members include Dr. John Ellis (Chairman), Dr. Matthew Malkan (President), and Professor Gail Heriot, who provided valuable assistance in the planning of this brief. The CAS believes that the expertise of its members in higher education puts it in special position to inform the Court about some of the issues presented in this case.

## SUMMARY OF ARGUMENT

Few, if any, race-preferential admissions policies are the product of the "diversity rationale"—the desire to confer the educational benefits of a diverse student body on *all* students. Much more common are those who advocate race-preferential admissions policies as a means to achieve "social justice." *See infra*, Part I.

But even that tells only a piece of the story More common than any of these ostensibly high-minded mo-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have provided blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or their counsel, made a monetary contribution to its preparation or submission.

tivations are the little practical ones. When outsiders—state legislators, private foundations, federally-recognized accrediting agencies, identity-politics organizations, etc.—push individual colleges or universities to engage in or expand their race-preferential policies, the colleges and universities usually succumb to the pressure. Their reasons do not relate to pedagogy. Practical politics is a better name for it. In the case of accrediting agencies with the power of the federal government behind them, these institutions have no choice. See *infra*, Part II. *See also* Brief Amicus Curiae of California Association of Scholars *et al.*, in *Fisher v. University of Texas*, No. 11-345 (filed October 20, 2011) (cert. stage).

This is a problem for the Respondent and for all colleges and universities whose policies are not motivated by, or narrowly tailored to fit, the diversity rationale. At least it is supposed to be a problem. The only purpose that Justice Powell viewed as potentially permissible in his opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 311 14 (1978), was the diversity rationale. Moreover, it is the only purpose found to be compelling by the majority in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Justice Powell explicitly rejected the "social justice rationale" in *Bakke*, and *Grutter* never attempted to gainsay that rejection. The Constitution simply does not permit discrimination in favor of one racial group and against another in order to even a score. It certainly does not permit discrimination just to placate state legislators, private foundations, federally-recognized accrediting agencies or identity-politics organizations.

One might have expected large numbers of lawsuits challenging race-preferential admissions policies based on pretext. But while *Grutter* leaves open the possibility of such challenges, , it doesn't make them easy, especially as its rationale was interpreted prior to *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) ("*Fisher I*"). *See, e.g., Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

The difficulty has been with the concept of deference to college and universities on academic matters even in the face of race discrimination—a concept first developed in *Grutter* and commonly known as "*Grutter*-deference." *Grutter*-deference has operated to insulate these policies. Especially given the higher education industry's historical tendency to indulge in race discrimination more, rather than less, than other industries, *Grutter*-deference has been a controversial concept. *See infra*, Part III (discussing Jewish quotas).

In *Grutter*, this Court agreed that race-preferential admissions policies must be subjected to strict scrutiny. But in determining whether the University of Michigan Law School's interest in diversity was compelling, the Court stated that the law school's "educational judgment ... is one to which we defer." 539 U.S., at 328. More importantly for the purposes of this brief, it deferred on the issue of pretext, stating that "good faith ... *is presumed* absent a showing to the contrary." 539 U.S., at 329 (emphasis added, internal quotation marks omitted).

Prior to *Fisher I*, it would have been nearly impossible for a plaintiff to mount a lawsuit—a very expensive lawsuit—that required her to provide admissible, institution-specific evidence of pretext at a long and

drawn out trial. Much of the available evidence is hearsay or not specific to the particular defendant institution. A plaintiff could have attempted to show pretext by showing that the policy was simply not tailored to fit the diversity rationale, but even if she had done a good job at that, *Grutter*-deference was being interpreted to require that the courts allow colleges and universities considerable leeway in designing their race-preferential policies. In theory, a plaintiff could have the wherewithal to make it to trial and present enough institution-specific evidence to persuade a court that, even with *Grutter*-deference, the defendant's policy was not narrowly tailored to the diversity rationale. But even if she did, she might still face an uphill battle in seeking permanent relief. If a court must defer to academic judgment, it arguably must allow the defendant institution the opportunity to modify its policy as many times as necessary to get it right. *See infra*, Part I.

*Fisher I* changed things by clarifying that *Grutter*-deference does not apply to the narrow tailoring part of the strict scrutiny analysis. But as the Fifth Circuit's opinion below illustrates, it did not solve the problem of pretext. Despite considerable general evidence that colleges and universities are seldom motivated by the diversity rationale, the Fifth Circuit failed to approach narrow tailoring with the kind of seriousness needed, given the likelihood that pretext plays a decisive role.

More clarification is necessary. That clarification could take the form of expanding strict scrutiny doctrine to include explicit evidentiary presumptions designed to smoke out pretext more efficiently. If alone among industries higher education should receive

*Grutter*-deference, then alone among industries it should be subject to explicit counterweights in the narrow tailoring phase of the analysis. The Court has a duty to prevent colleges and universities from too easily claiming the diversity rationale as a pretext masking their illegitimate racial-preference policies. *See infra*, Part IV.

For example, a college or university that has been bullied by state legislators on this issue should be required to prove by clear and convincing evidence that the legislators' conduct did not influence its policies. Such a requirement is already implicit in the strict scrutiny concept of narrow tailoring. But it should be made explicit. *Id.*

Note that such a presumption would have the added virtue of discouraging outside actors from engaging in such pressure. Such an approach could possibly help phase out race-preferential admissions on the 25-year schedule discussed in *Grutter*. 539 U.S., at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary").

## ARGUMENT

As a counterweight to *Grutter*-deference, race-preferential admissions policies should be subjected to tough evidentiary presumptions in the narrow tailoring phase of the analysis. When pretext is a significant possibility, litigants must be given effective tools to smoke it out.

## I. Prior to *Fisher I*, *Grutter*-Deference Was Interpreted To Insulate Colleges and Universities From Liability Despite Strong Evidence That Concern Over the Pedagogical Benefits of Diversity Was Often a Pretext.

In *Grutter*, this Court held that race-preferential admissions policies must be subjected to strict scrutiny. But in applying that test it stated: "The [University of Michigan] Law School's educational judgment that such diversity is essential to its educational mission is one to which *we defer*." 539 U.S., at 328 (emphasis added).

In addition, the *Grutter* Court was deferential to the law school on the issue of pretext, stating that "good faith ... *is presumed* absent a showing to the contrary." 539 U.S., at 329 (emphasis added, internal quotation marks omitted). The law school was thus freed from proving that its motive was in fact the desire to secure the pedagogical benefits of diversity for all its students. In the absence of admissible, institution-specific proof to the contrary, it was sufficient that it said so.

Up to that point, strict scrutiny and deference to a state institution engaging in race discrimination had been assumed by many to be incompatible concepts. *Grutter* seemed to place universities on a lofty pedestal. Now, alone among institutions that engage in race discrimination (and despite their disturbing history of discriminating more than most other institutions against African Americans, Jewish Americans and

Asian Americans), their policies were given a strong presumption of legitimacy.[2]

Even in 2003, however, it was an open secret that race-preferential admissions policies were not ordinarily directed to securing the pedagogical benefits of diversity for all students, but rather were intended to serve other goals, both large and small. *See* Brian Fitzpatrick, *The Diversity Lie*, 27 Harv. J. L. & Pub. Pol'y 385 (2003). Professor Randall Kennedy mentioned an alternative motivation (one already rejected in *Bakke* and *Grutter*) when he stated:

> Let's be honest: Many who defend affirmative action for the sake of "diversity" are actually motivated by a concern that is considerably more compelling. They are not so much animated by a commitment to what is, after all,

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[2] It is worth noting that the federal bureaucracy does not appear to take *Grutter*-deference seriously in any context other than race-preferential admissions. For example, U.S. Department of Education regulations under Title II of the Americans with Disabilities Act, 42 U.S.C.A. § 12101 *et seq.*, cut back on the authority of universities to disenroll students who are threatening suicide. Ordinarily, one might expect (given race discrimination's special place in the law) that if deference is due to universities that engage in race discrimination, at least as much deference would be due to universities that conclude that a student with a mental illness is interfering with the education of others. But that would be incorrect. 28 C.F.R. § 35.139. Instead, when an extension of *Grutter*-deference is argued for, it tends to be for an expansion of race-preferential treatment into non-academic contexts. *See, e.g.*, Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. Rev. 937 (2008) (expressing disappointment that *Grutter*'s "deferential form of strict scrutiny review" had not yet led to a re-examination of the law concerning race-preferential public contracting).

> only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice.

Randall Kennedy, *Affirmative Reaction*, Am. Prospect (March 1, 2003); *see also* Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979) ("I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students").

But while *Grutter* in theory left open the possibility that a plaintiff could make a "showing" of pretext, in practice no victim was likely to have the resources to conduct such a fact-intensive, institution-specific inquiry. Further clarification from the Court on the limits of deference was needed.

The problems were serious. Under *Grutter*, for example, even if a victim were to prove at trial that a particular university's motives were unconstitutional, permanent relief would not necessarily be forthcoming. Universities are fluid organizations. New faculty members and administrators are constantly being added; old ones are retiring. A university whose motives had been proven to be unconstitutional at trial could easily turn around and claim that it had seen the light. Its new faculty members and administrators, in the exercise of the vague rights to academic freedom alluded to in *Grutter*, could argue that in the future their reasons for race-preferential admissions would center on the diversity rationale. If *Grutter*-deference to academic authority had been interpreted as broadly as colleges and universities were urging, even

a crowbar would not have been able to dislodge unconstitutionally-motivated policies.[3]

Fortunately, then came *Fisher I*. By clarifying that *Grutter*-deference does not apply to strict scrutiny's narrow tailoring requirement, *Fisher I* held out the promise that the pretext issue would be taken seriously by the courts.[4]

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[3] In his concurrence in *Fisher I*, Justice Thomas noted the similarities between Jim Crow-era cases like *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and this case. *Fisher I*, 133 S. Ct., at 2424-28. Imagine what the world would look like today if the *Brown* Court had (1) deferred to school districts that claimed that segregated schools were necessary for educational betterment of all; and (2) had held that in the absence of a showing to the contrary it would presume that these school districts were indeed so motivated.

Carrying the *Brown* analogy a bit further, *Browder v. Gayle*, 352 U.S. 903 (1956) (per curiam), may be useful to consider. *Browder* came to the Court on the heels of *Brown*. *Brown* had relied on Kenneth and Mamie Clark's famous doll studies to demonstrate that separate is unequal in the context of education because it "generates a feeling of inferiority as to [black children's] status in the community. 347 U.S., at 494. But *Browder* concerned bus segregation, not school segregation, so *Brown*'s logic did not directly apply. There was good reason to believe that civil rights advocates would have to construct their argument on public transportation from the ground up. In an opinion noted for its extreme brevity, however, the Court held, without explanation, that *Brown* did apply, thus signaling that it would not entertain case-by-case litigation over whether "separate but equal" is equal. Case-by-case litigation is as counterproductive in the present context as it would have been in the context of Jim Crow. When it comes to race discrimination, strong and simple prohibitions are the most—and perhaps the only—effective remedy.

[4] Prior to *Fisher I*, there was never a need to patrol the boundary between the "compelling governmental interest" and the "narrow tailoring" portion of the strict scrutiny test. Indeed, many would

As the Fifth Circuit's decision on remand makes apparent, however, *Fisher I*'s promise has yet to be fulfilled. The Fifth Circuit clearly needs more guidance, and there is no reason to suspect that other federal and state courts will not also require additional guidance in this area of the law. One way to provide that guidance is through explicit evidentiary presumptions, shifting the burden of proof to defendants upon specific showings. Such presumptions can be designed to function as counterweights to *Grutter*-deference.[5] *See infra*, Part IV.

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have scoffed at the notion that a distinct boundary was possible. *Fisher I*'s dual approach allowing deference on the issue of compelling purpose, but declining to give deference in the area of narrow tailoring, creates the need to make a sharp distinction. Consider, for example, the different ways in which the *Grutter* Court could have articulated the compelling interest it found: Might the University of Michigan Law School have persuaded the Court that it had a broad compelling interest in ensuring that its students are exposed to new and different ideas and experiences? Or might it have persuaded the Court that it had a narrow compelling interest in securing for each of its classrooms the educational benefits of having at least 20% of its students from under-represented racial minorities? If it had done the former, the narrow-tailoring part of the analysis would have necessarily been very broad-ranging. If it had done the latter, the narrow-tailoring part of the analysis would have to be much more limited. It is thus worth pointing out what the *Grutter* Court actually identified as the compelling interest: It was "the educational benefits that flow from a diverse student body." Such a purpose is fairly abstract and hence moves most of the analysis to narrow tailoring.

[5] *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (providing appropriate structure to the problem of proof of discriminatory intent in employment discrimination cases). Note that the strict scrutiny doctrine is itself essentially a set of presumptions built on the recognition that race discrimination—

## II. Because Much of the Pressure for Race-Preferential Admissions Policies Comes From Outside Colleges and Universities, Those Policies Should Not Be Entitled To Deference.

### A. State legislatures, the federal government, private foundations, alumni donors and student groups motivated by their own view of social justice or by an old-fashioned racial spoils system are among those who vie to influence admissions policies.

In *Grutter*, it was "[t]he Law School's *educational* judgment that such diversity is essential to its *educational* mission" that received deference. *Grutter*, 539 U.S., at 332 (emphasis added). The double use of the word "educational" shows the Court intended to emphasize that deference is available only for true *academic* judgments rather than mere political ones. Academic judgments are made by academic faculties based on academic considerations. They are not made by outsiders to the academic enterprise or by those bowing to pressure from outsiders.

Real "educational judgment" is seldom the driving force behind race-preferential admissions policies, however. For example, private foundations are often eager to expand opportunities for certain (but not other) under-represented racial or ethnic groups in

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even when it is well-meaning—is almost never in the public interest. The CAS respectfully requests the Court to consider the possibility that special tools may be necessary and proper in this situation, too.

higher education. Knowing full well that this will be accomplished through race-preferential admissions policies that disadvantage Asian American and white groups, they offer "diversity grants" to colleges and universities that promise to "diversify" their student bodies. Colleges and universities, ever-alert to the need for fund-raising, jump at the chance. *See, e.g.*, Daryl Smith, *Building Capacity: A Study of the Impact of the James Irvine Foundation Campus Diversity Initiative* (May 2006).

Students groups are eager for influence, too. The fact that they frequently take an interest in race-preferential admissions policies is aptly illustrated by their amicus curiae briefs. *See, e.g.*, Brief of Amici Curiae UCLA Law Students of Color in Support of Respondent, *Grutter v. Bollinger*, No. 02-214 (filed February 18, 2003) (arguing that "the government is permitted to reverse the harm caused by previous destructive discriminatory acts"). Their interest takes many forms, but the substantive focus is overwhelmingly on their view of social justice, not on pedagogy. See *Marquette Protest on Diversity, University Seal*, Inside Higher Ed (April 28, 2015); Jaleesa Jones, *Colgate University Students Ask #CanYouHearUsNow*, USA Today (September 24, 2014); Samantha Tomilowitz & Sam Hoff, *UCLA Law Students Protest Lack of Diversity*, Daily Bruin (Feb. 10, 2014).

Sometimes it is state legislatures or other state agencies that try to influence admissions policy. For example, only a few months ago, the Delaware General Assembly held a budget hearing at which a member called the University of Delaware's diversity record "disappointing" or "discouraging." Another mem-

ber said that the University must work harder to remedy the situation. *See* Jon Offredo & Jonathan Starkey, NAACP, *State Lawmakers: UD is Lacking in Diversity*, The News Journal (Feb. 10, 2015). It is worth noting that in Rhode Island, it is the governor-appointed Board of Governors for Higher Education (recently merged into the Board of Education) that has long imposed affirmative action requirements on Rhode Island public colleges and universities. *See* Rhode Island Board of Governors for Higher Education, Affirmative Action and Equal Opportunity—Policy and Regulations.[6] Whether they are motivated by racial spoils or by their view of social justice is not important. It is unlikely they are motivated by a desire for good pedagogy and in any event are not expert in pedagogy.

The federal government pressures colleges and universities through various mechanisms as well. Among them is the one established by the Public Health Service Act, Title VII, § 736, 42 U.S.C. § 293 (2011), which funds programs in health professions education. HHS allocates funds to schools of medicine, dentistry, pharmacy, and graduate programs in behavioral or mental health in part on the basis of whether these schools "have a significant number of URM [under-represented minority] students enrolled."

None of these organizations or governmental entities are entitled to *Grutter*-deference. It is highly unlikely that the *Grutter* Court would have deferred to a college or university's political goals or budgetary

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[6] Available at http://www.ribghe.org/affirmativeactionpolicy.pdf (all URL's last visited September 7, 2015).

judgment that it must cater to them. Nor should future courts.

### B. Federally-designated accrediting agencies are especially inclined toward pressuring individual colleges and universities toward greater racial preferences.

In the academic world, accrediting agencies are frequently the most active enforcers of diversity. In the 1990s, fully 31% of law schools and 24% of medical schools admitted to political scientists Susan Welch and John Gruhl that they "felt pressure" "to take race into account in making admissions decisions" from "accreditation agencies." *See* Susan Welch & John Gruhl, *Affirmative Action in Minority Enrollments in Medical School and Law School* 80 (1998).[7]

When accreditors speak, the institutions they govern must listen. As the U.S. Department of Education's designated accreditation agencies, the Council of the American Bar Association's Section on Legal Education and Admissions to the Bar ("ABA") and the Liaison Committee on Medical Education ("LCME") decide whether a school will be eligible for federal funding, including funding for student loans. Effectively, these accreditors *are* the federal government.

Note that neither the ABA nor LCME is an academic institution itself. LCME, for example, describes itself as consisting of "medical educators and administrators, practicing physicians, public members and

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[7] Indeed, respondents volunteered the information. They were asked if they had felt pressure from sources other than the federal and state governments. If they answered "yes," they were asked to specify which groups.

medical students." See *About the Liaison Committee on Medical Education (LCME)*.[8] More importantly, neither is itself a college or university. If centralizing forces like the ABA and LCME are given their own "academic freedom," they have the power to destroy the academic freedom of individual college and universities in those situations where academic freedom and judgment is truly appropriate.

There is evidence that the pressure from accreditors to increase diversity is growing (and no evidence of which the CAS is aware to the contrary). The CAS, in cooperation with the NAS, recently conducted a round of state public records requests of state medical schools. Out of the sixteen schools that have responded or partially responded as of this writing, half have been cited for problems with diversity. At the University of Nevada Medical School at Reno, for example, the 2009 Survey Team found that "the numbers of students and faculty of diverse backgrounds have been consistently low," and the 2012 Survey Team found the school to be "noncompliant" with diversity accreditation standards.[9] Similarly, the 2009 Survey Team for Wright State University School of Medicine reported:

> Diversity of the student body has been somewhat problematic. There has been a steady de-

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[8] Available at http://www.lcme.org/about.htm.

[9] Ad Hoc Survey Team, Report of the Secretariat Fact-Finding Survey of the University of Nevada School of Medicine 4, 9 (April 1-3, 2012). The various LCME survey team reports cited herein are available at https://www.nas.org/images/documents/ LCME_FOIA_Documents.pdf.

> cline in the number of African-American student applicants and students from 309 applicants in 2001 to 241 in 2007, and from 50 total African-American students in 2001 to 32 in 2007. At the same time there are no Hispanic students. The number of Asian students has increased ....[10]

As a result, the accreditor classified Wright State's diversity as an area "of transition, whose outcome could affect the school's ongoing compliance with accreditation standards."[11]

At the University of South Alabama College of Medicine, the accreditor named diversity as an area of "partial or substantial noncompliance," finding that "[d]iversity among faculty and students has not increased notably in the past seven years."[12]

Like LCME, the ABA requires law schools to demonstrate their commitment to diversity. Not long after *Grutter*, the ABA ramped up its requirements for diversity, apparently in the mistaken belief that *Grutter* empowered *it* rather than actual law schools.[13] In

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[10] Ad Hoc Survey Team, Team Report of the Survey of Wright State University, Boonshoft School of Medicine 38 (March 22-25, 2009).

[11] *Id.*, at 2-3 (Hopkins Letter).

[12] Ad Hoc Survey Team, Team Report of the Survey of University of South Alabama College of Medicine 2 (Moulton Letter) (September 26-29, 2010).

[13] These changes were a significant focus of discussion in a report by the U.S. Commission on Civil Rights. See U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools* at 90-137, 175-80 (2007) ("USCCR-AAALS Report"), available at http://www.usccr.gov/pubs/AALSreport.pdf.

essence, the ABA enforces a "diversity cartel" among law schools, effectively insulating schools that give large preferences from competition on issues like bar passage rate with schools that would rather give smaller preferences or none at all.

The ABA is fully aware that the only way to comply with its standards is to give preferential treatment to students from under-represented minorities. In its amicus brief in *Grutter*, it told the Court that "[r]ace-conscious admissions are essential to increasing minority representation in the legal system." "[I]t is unquestionable," the ABA wrote, "that the improvement in minority participation ... has been achieved largely by the use of race-conscious admissions policies such as those under attack here." Brief Amicus Curiae of the American Bar Association in *Grutter v. Bollinger*, No. 02-241 at 18-21 (filed February 19, 2003) (capitalized standardized). Nine years later, it took the same position in its amicus curiae brief in *Fisher I*. Brief Amicus Curiae of the American Bar Association in *Fisher v. Texas*, No. 11-345 at 20-29 (filed August 13, 2012) ("Race-conscious admissions policies are essential to increasing minority representation in the legal profession") (original in all capitals).

Moreover, the ABA has not hesitated to overrule the *educational judgment* of the law schools it regulates. In 2006, for example, the Charleston School of Law unexpectedly failed to win accreditation from the ABA after a favorable recommendation from its Accreditation Committee. According to news reports, the ABA's concerns focused in part on race. *See* James T. Hammond, *Charleston School of Law: Fails to Win Accreditation So Students Can Take Bar*, The State (Columbia, S.C.) (July 12, 2006). Final accreditation was

not awarded until the dean had declared that "[w]hatever we have to do [to win accreditation], we'll do it" and a new director of diversity was publicly announced. *Id.*; College Notes: Charleston Law Taps Diversity Director, The State (Columbia, S.C.) B3 (August 13, 2006); *see also* David Barnhizer, *A Chilling Discourse*, 50 St. Louis L. J. 361 (2006) (describing ABA influence on faculty diversity-hiring).

The case of George Mason University School of Law is particularly troubling. Its story began with the ABA's site evaluation team visit in 2000. The site-evaluation team was unhappy that only 6.5 percent of entering day students and 9.5 percent of entering evening students were minorities. U.S. Commission on Civil Rights, Affirmative Action in American Law Schools at 181 (2007) ("USCCR-AAALS Report").

Nobody could argue that GMU's problem was lack of outreach. Even the site evaluation report conceded that GMU had a "very active effort to recruit minorities." Indeed, it described those efforts at length. It noted, however, that GMU had been "unwilling to engage in any significant preferential affirmative action admissions program." Since most law schools were willing to admit minority students with dramatically lower academic credentials, GMU was at a recruitment disadvantage. *Id.*, at 182.

GMU's faculty members did not all have the same views on affirmative action. Some members considered even small admissions preferences to be morally repugnant; others believed they would hurt rather than help their intended beneficiaries. But some were willing to put a slight thumb on the scale in favor of African Americans and Hispanics. What set GMU

apart from many laws schools was that a strong majority opposed the overwhelming preferential treatment commonly practiced elsewhere.[14] The site-evaluation report noted its "serious concerns" with GMU's policy. *Id.*

Over the next few years, the ABA repeatedly refused to renew GMU's accreditation, citing its lack of a "significant preferential affirmative action program" and supposed lack of diversity. Back and forth the negotiations went. Although GMU could and did step up its already-extensive recruitment efforts, it was forced to back away from its opposition to significant preferential treatment. It was thus able to raise the proportion of minorities in its entering class to 10.98 percent in 2001 and 16.16 percent in 2002. *Id.*, at 183.

None of this was enough. The ABA didn't want slow, deliberate movement in its direction; it wanted utter capitulation. Shortly after the Court's decision in *Grutter*, an emboldened ABA summoned the GMU president and the law school dean to appear personally before it and threatened the institution with revocation of its accreditation on account of its alleged diversity problem. GMU responded by further lowering minority admissions standards and expanding resources devoted to diversity, all in hopes of soothing

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[14] The number of academics who share their views is much greater than many suppose. *See, e.g.*, Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 Minn. L. Rev. 1233 (1988); Thomas Wood, *Who Speaks for Higher Education on Group Preferences?*, 14 Academic Questions 31 (Spring 2001).

the ABA's wrath. As a result, 17.3 percent of its entering students were minority members in 2003 and 19 percent in 2004. USCCR-AAALS Report at 183.

Still the ABA was not satisfied. This time their focus was on African-American students specifically. "Of the 99 minority students in 2003, only 23 were African-American; of 111 minority students in 2004, the number of African Americans held at 23," the ABA complained. It didn't seem to matter that sixty-three African Americans had been offered admission or that the only way to admit more was to lower admissions standards to alarming levels. It didn't even matter that many students admitted under those circumstances would incur heavy debt, but never graduate and pass the bar. GMU's skepticism about racial preferences was heresy, and the ABA was determined to stamp it out. *Id.*, at 184.

GMU finally got its re-accreditation after six long years of abuse—just in time for the next round in the seven-year re-accreditation process. *Id.* Sure enough, the ABA's 2007 site evaluation team report again raised concerns that GMU was not in compliance with ABA diversity standards.

Meanwhile, an important question was not being asked: What happened to the minority students who were admitted in the first round against the GMU faculty's better judgment? The ABA was apparently not so interested in that. The ABA was not making an educational judgment about pedagogy; it was preening itself in an effort to show its highly superficial concern for social justice.

But GMU's dean, Daniel D. Polsby, was very interested in the fate of his students. In a letter dated January 3, 2008 to Hulet H. Askew, the ABA Consultant on Legal Education (the "Polsby Letter"),[15] responding to the ABA's 2007 site evaluation report, Dean Polsby patiently explained the damage inflicted by the ABA's enforcement of diversity standards.

As the ABA failed to recognize, when students attend a school at which their entering academic credentials are well below those of their peers, they will usually earn grades to match. During the period from 2003 to 2005, while GMU was under pressure to increase its racial diversity, African-American students experienced dramatically higher rates of academic failure (defined in GMU's academic rules as a GPA below 2.15). Fully 45% of African-American law students at GMU experienced academic failure as opposed to only 4% of students of other races.

Dean Polsby put the problem plainly: "We have an obligation to refrain from victimizing applicants, regardless of race or color, by admitting them to an educational program in which they appear likely to fail." Polsby Letter at 14.

Part of the tragedy, of course, is that the empirical evidence indicates that many of these students would have stood a greater chance at success in their goal of becoming lawyers if they had attended a law school at which their entering academic credentials had been more like the median student's. *See* Gail Heriot, *A*

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[15] Available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/05/Response-to-ABA-Site-Visit-Report-2.pdf

*"Dubious Expediency:" How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, Special Report No. 167 (August 31, 2015).[16] But the ABA prevented that.

In sum, the evidence is very strong that colleges and universities resort to race preferences for a variety of reasons, and at the very least, many of those reasons have little to do with the educational value of diversity. Yet under *Grutter*, proving pretext has been made more difficult than it should be. By clarifying that deference has no place in narrow tailoring analysis, *Fisher I* gave litigants hope the problem can be made manageable. But actually making it so will require making the steps in its narrow tailoring analysis more explicit. As a counterweight to *Grutter*-deference, colleges and universities need to know the circumstances under which their assertion of the diversity rationale will be deemed pretextual. This can be accomplished through a series of explicit evidentiary presumptions as described in Part IV.

## III. The Higher Education Industry Is An Unlikely Recipient of Deference On Issues of Race. Instead, Higher Education's Long History of Race Discrimination Combined with Its Modern Tendency Toward Marching In Lockstep Should Counsel Extra Judicial Caution.

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[16] Available at http://www.heritage.org/research/reports/2015/08/a-dubious-expedi ncy-how-race-preferential-admissions-policies-on-campus-hurt-minority-students.

If further reasons to provide counterweights to *Grutter*-deference are needed, they can be found in the higher education industry's history and structure. Education—particularly higher education— differs from more typical enterprises in at least two important ways. First, the quality of its services is difficult to measure. Second, in part because its benefits are believed to extend beyond students, it is heavily subsidized by government and charitable foundations. This renders it somewhat insulated from both competition and criticism and vulnerable to demands for various kinds of patronage.

As a consequence of these structural factors, education is prone to fads—some of which can become deeply rooted. Some are relatively harmless. *See, e.g.*, William R. Daggett, et al., *Color in an Optimum Learning Environment* (2008) (recommending that mathematics classrooms be painted indigo or blue and that social studies classrooms be painted orange, green or brown). Sometimes, however, they can have seriously harmful effects. *See, e.g.*, Paul A. Kirschner, *et al.*, *Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and Inquiry-Based Teaching*, 41 Educ. Psychologist 75 (2006) (recounting the extreme popularity over the last half century of pedagogical methods that emphasize unguided or minimally-guided student learning and discussing the evidence that, at least for students without considerable prior knowledge, these methods are less effective than more guided learning).

Over their history, colleges and universities have often fallen prey to fashionable race discrimination. *See McLaurin v. Oklahoma State Regents*, 339 U.S.

637 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (per curiam). Consequently, they are unlikely candidates to receive special deference on matters of race. *Cf.* Gary Becker, The Economics of Discrimination (1971) (arguing that institutions that are protected from competition, like government and government-protected monopolies, are more likely to engage in racial discrimination than institutions that are subject to more direct market pressure).

Sometimes the pressure for race discrimination has come from the outside. For example, before 1950, the University of Texas was subject to the Texas Constitution's racial segregation requirement in education, and probably could not have integrated its classrooms had it wanted to. *See* Tex. Const. art. VII, §§ 7, 14 (1948); *Sweatt v. Painter*, 339 U.S. 629, 631, n.1 (1950); *see also* C. Vann Woodward, The Strange Career of Jim Crow 50 (3d rev. ed. 1974) (suggesting that the push for Jim Crow segregation came largely from poor Southern whites who used their political clout to disadvantage their black economic and social competitors); Welch & Gruhl, at 80 (demonstrating that modern law and medical schools often view themselves as pressured to engage in race-preferential admissions).

Sometimes, however, the pressure for racial discrimination has come from within the elite academy and from its students and alumni. Consider, for example, the Jewish quotas that swept the Ivy League beginning in the 1920s. What evidence there is strongly suggests that these policies reflected the prejudices and resentments of elites rather than of ordinary Americans. Boston Mayor James Curley, an official known for his common touch, vehemently opposed Jewish quotas. Referring specifically to the case of

Harvard, he declared: "If the Jew is barred today, the Italian will be tomorrow, then the Spaniard and the Pole, and at some future date the Irish." *See* Marcia Graham Synnott, A Social History of Admissions Policies at Harvard, Yale, and Princeton, 1900-1930, at 357-58, 365-66 (1974) ("Social History").[17]

It was well-educated Americans, not Mayor Curley's boisterous blue-collar supporters, who had the greatest incentive to resent the extraordinary success that Jewish students were having (and continue to have) in higher education. Jews were less than 4% of the American population in 1920. But by that time, Columbia University's entering class may have been as much as 40% Jewish, and the University of Pennsylvania's was similar.[18] Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion

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[17] Similarly, Samuel Gompers condemned Jewish quotas on behalf of the American Federal of Federation of Labor. Social History, at 358. Indeed, newspapers and magazines from as far away as China carried critical stories. As an article in The Nation put it:

> To tell a Cohen, whose average on the college board examination was 90, that he cannot enter because there are too many Jews already, while a grade of 68 will pass a Murphy, or one of 62 a Morgan, hardly seems in line with the real interests of the college.

William T. Ham, *Harvard Student Opinion on the Jewish Question*, The Nation 226-27 (Sept. 6, 1922); *see also Harvard Faces Problem of Cutting Down Number of Students Attending By Refusing Admission to Jews*, North China Star 6 (Aug. 15, 1922); *Down Hill from Harvard to Lowell*, Boston Telegram (June 6, 1922) (cited in Social History at 356-58, 365-66).

[18] For more recent estimates, *see* College Guide: Hillel's Guide to Jewish Life at College and Universities (estimating Harvard's

at Harvard, Yale and Princeton 86-88 (2005) ("Karabel"). Within a few years, Harvard's entering class was 27.6% Jewish, and Yale's enrollment was 13.3%. *Id.*, at 105, 114. Most of these students were from families that had only recently come to America, making their accomplishment all the more impressive.

The resentment against Jewish students was by no means always subtle. To some Ivy Leaguers, these new immigrants and their offspring were upstarts, grinds or even "greasy grinds," all-too-eager to replace the established elite. One Harvard alumnus, writing to Harvard president A. Lawrence Lowell, was openly contemptuous:

> Naturally, after twenty-five years, one expects to find many changes but to find that one's University had become so Hebrewized was a fea[r]ful shock. There were Jews to the right of me, Jews to the left of me, in fact they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust ....

Karabel, at 105 (quoting Dec. 17, 1925 letter).

At the time, Lowell was also the vice president of the Immigration Restriction League, an organization steeped in that era's scientific racism. He was determined to do something about what he called "the Hebrew problem" at Harvard, and argued it affected both student recruitment and alumni fundraising:

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undergraduate population to be about 25% Jewish and Yale's undergraduate population to be about 27%), available at http://www.hillel.org/college-guide/search#.

> The summer hotel that is ruined by admitting Jews meets its fate, not because the Jews it admits are of bad character, but because they drive away the Gentiles, and then after the Gentiles have left, they leave also. This happened to a friend of mine with a school in New York, who thought, on principle, that he ought to admit Jews, but who discovered in a few years that he had no school at all.

*Id.*, at 88 (quoting May 19, 1922 Lowell letter to William Hocking).

Lowell originally wanted to deal with the issue by publically adopting a ceiling on Jewish enrollment. But when the faculty initially balked, he put forth a more subtle plan. "To prevent a dangerous increase in the proportion of Jews," he insisted that future admissions should be based on a "personal estimate of character on the part of the Admission authorities." Marcia Graham Synnott, The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970, at 108 (1979) ("Half-Opened Door").[19]

At Lowell's behest, therefore, Harvard adopted such an exclusionary admissions process in 1926. Shortly thereafter, Yale's Dean Clarence Mendell paid a visit to Harvard's admissions director. He reported that Harvard was "now going to limit the Freshman Class to 1,000 .... They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting

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[19] In *Bakke*, Justice Powell wrote favorably of Harvard's longstanding efforts for geographical diversity. He was apparently unaware that the policy was part of the effort to limit the numbers of Jewish students, who tended to be concentrated in Northeastern urban centers.

without detailed explanation. They are giving no details to any candidate any longer." *See id.*, at 109.[20]

It took decades for Ivy League schools to climb out of the pit they had dug for themselves. Part of what allowed them to do so was good old-fashioned competition from upstart universities that refused to discriminate. One of the best examples of a university willing to buck the trend was the University of Chicago, which was then a relatively young institution, having been founded in 1890. At the time, few would have regarded the University of Chicago as the leading university it is today. It did not have the warm patina of age that Harvard (founded 1636) had. But it rejected the notion that a university could have "too many Jews." It wanted the best students it could get.

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[20] The situation was not quite the same for blacks. Harvard, for example, takes pride in its reputation for relative openness to blacks, and all things considered, it did indeed have a better record than most institutions of the period. It was a record that was tarnished by Lowell, who segregated living and dining facilities over the objections of many alumni. On the other hand, at Princeton, perhaps the least friendly of the Ivies to racial minorities, not a single black attended in the 20th century until 1945, and at least one was actively discouraged from enrolling. Still, even at Princeton, blacks occasionally attended in the 18th and 19th centuries. *See* Half-Opened Door at 47-53, 80-84; Karabel at 228, 232-36. Ivy Leaguers did not imagine that black students would come to dominate business and industry. Even at Harvard, their numbers were small, perhaps as few as 165 total between 1871 and 1941. *Id.* Alumni felt no reason to worry, consciously or unconsciously, that blacks would crowd their offspring out of elite status. Black students were curiosities. Any "old guard" is likely at its worst when its members perceive that a group of newcomers may come to take a take a significant share of the benefits that its elite institutions can confer. The group that presented that challenge at the time was Jews, not blacks.

Eighty-nine Nobel prizes later, it is now regarded as one of the nation's finest universities.

History repeats itself—with a crucial difference: Now federally-recognized accreditors make it harder for upstart universities to resist fashionable nonsense. Today the "problem" on some campuses is not just "too many whites," but "too many Asians." Asians are perceived as the new "upstart students" at highly competitive universities. One extensive study of admissions at elite private colleges found Asian applicants with perfect SAT scores of 1600 had the same chances of being accepted as white applicants with 1460s and African-American applicants with 1150s. Thomas Espenshade & Alexandria Walton Radford, No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life (2009). The authors caution that this research does not purport to reveal the reason for this, since the data did not include so-called "soft variables" like extracurricular activities and teacher recommendations. But, in part as a response to Espenshade's findings, Asian students are now urged not to list themselves as Asian on their admissions applications to elite institutions. *Some Asians' College Strategy: Don't Check "Asian"*, USA Today (Dec. 3, 2011). There is a clear message being sent to Asian-American students: America is not the nation it purports to be.

On May 15, 2015, more than 60 Asian-American organizations filed a complaint with the U.S. Department of Education's Office for Civil Rights alleging that Harvard University is engaged in a pattern of race discrimination against Asian-American applicants. On June 3, 2015, the Department dismissed the complaint, apparently on the ground that a lawsuit

had been initiated by *individuals sponsored by a different organization* against Harvard on a similar ground. *See* Douglas Belkin, *Harvard Asian-American Bias Complaint Dismissed*, Wall Street Journal (July 7, 2015).

The CAS is not arguing that college administrators bear ill-will toward Asians (or towards Scots-Irish, Cajuns, Hmong, or any other under-represented group that is ignored by fashionable diversity policies). While outright malice against Asians is not as unknown as it should be, *see* G.W. Miller III, *Asian Students Under Assault: Seeking Refuge from School Violence*, Philadelphia Weekly (Sept. 1, 2009), it is thankfully rare as a motivation for college administrators. Instead, there is simply a failure of empathy. As President William Clinton (mistakenly) has put it, "[Without race-preferential admissions], there are universities in California that could fill their entire freshman classes with nothing but Asians." Leo Rennert, *President Embraces Minority Programs*, Sacramento Bee (Apr. 7, 1995).

Higher education has historically been more prone to race discrimination than other industries rather than less so. Moreover, the centralizing force of federal subsidies enforced through federally recognized accrediting agencies threatens to aggravate the problem. The Constitution and its command of Equal Protection should not be and is not oblivious to this.

## IV. If Alone Among Industries Higher Education Should Receive *Grutter*-Deference, Then Alone Among Industries It Should Be Subject to Explicit Counterweights In the Narrow Tailoring Phase Of The Analysis In Order To Prevent the Diversity Rationale From Being Too Easily Used As a Pretext.

### A. Those institutions that use the diversity rationale as a pretext should be not given a second chance to conform themselves to the constitution's mandate.

In some ways the narrow tailoring analysis is easy. The fact that diversity policies always focus at least in substantial part on "*under-represented* minority groups" should be enough to prove that they are not really based on the diversity rationale. If they were, it would not matter whether a racial group is under-represented or over-represented. What would matter is whether a group is tiny (and hence unlikely to have effective voice). If a racial group makes up, for example, 30% of the population, but only 15% of students, it is still hard to argue that racial preferences are needed to amplify their voice. On the other hand, a racial group that is ¼% of the population, but ½% of students might have a stronger argument for diversity preferences, even though it is in fact over-represented.

Put differently, if the pedagogical benefits of diversity mattered to universities, they would be beating the bushes for groups like Armenian Americans, Burmese Americans, Menominees, and Russian Jewish emigres. The fact that race-preferential admissions

policies target racial groups who are large enough to have significant political clout proves that it is not just about diversity or even just about disadvantage. The policies are not tailored to diversity at all, much less narrowly tailored to it.

A public college or university that has been found to be using the diversity rationale as a pretext is acting unconstitutionally. Once it has been found to be doing so, it should not be permitted to simply turn around and change its policy to fit the diversity rationale. Instead, it should be made clear to all that its motives will be regarded as tainted indefinitely. *Cf. McCreary County v. ACLU*, 545 U.S. 844 (2005). In the absence of overwhelming evidence to the contrary, once its policy has been found insufficiently tailored to the diversity rationale, any admissions policy it adopts that is not race neutral should be presumed pretextual.

### B. Those institutions that have been pressured or given incentives to engage in race-preferential admissions policies should bear the burden of proving by clear and convincing evidence that they would have tailored their admissions standards in exactly the same way even in the absence of that pressure or incentive.

In its petition-stage *Fisher I* amicus brief and in this brief, *supra*, Part II, CAS has shown that *Grutter*-deference is not due to schools that have been pressured or given incentives to adopt race-preferential admissions policies (or to increase the level of prefer-

ence in their policies). That limitation on *Grutter*-deference can be made operational through the narrow tailoring phase of the analysis by way of explicit presumptions. For example:

(1) An institution that is pressured or given an incentive by a governmental authority (including a federally recognized accrediting agency) on matters relating to the racial composition of its class should be presumed to have been influenced by that authority and thus required to prove by clear and convincing evidence that its race-preferential admissions policies were not in any way more preferential than they would have been in the absence of that pressure.

(2) An institution that applies for or receives a benefit from a foundation in which information on the racial composition of its class is requested or taken into consideration in deciding on the institution's eligibility for the benefit should be presumed to have been influenced by the grantor and thus required to prove by clear and convincing evidence that its race-preferential admissions policy were not in any way more preferential than they would have been in the absence of that pressure.

These presumptions are implicit in the meaning of strict scrutiny (just as strict scrutiny is implicit in the text, structure and history or the Equal Protection Clause of the Fourteenth Amendment). They should be made explicit. Making them so will give guidance in an area where guidance is very much needed. *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (a decision that suggests that respondent universities could benefit from additional

guidance in the area of race-preferential admissions policies).[21]

In *Grutter*, the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S., at 343. In a few months, around the time oral argument in this case is being held, we will be halfway to that deadline. Instead of progressing toward that goal, the evidence suggests that we may be regressing. *See* Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan*, Center for Equal

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[21] If the Court is disinclined to provide explicit evidentiary presumptions as counterweights to *Grutter*-deference, it should consider overruling *Grutter*-deference (and hence *Grutter*) entirely. Without *Grutter*-deference, no university could have carried its burden demonstrate a compelling governmental interest. Among other reasons, it is difficult to see how an interest can be constitutionally "compelling" if most members of the public do not see it even as convincing. Since the presumption should always be in favor of race neutrality and against race discrimination, a controversial application of race discrimination should be an unconstitutional one. *See* Gail Heriot, *Strict Scrutiny, Public Opinion and Racial Preferences on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in A Policy Most Americans Oppose?*, 40 Harv. J. Legis. 217 (2003) (arguing that deference to a public preference for race neutrality is both appropriate and implicit in the doctrine of strict scrutiny, while a public or governmental preference for race discrimination is entitled to no weight whatsoever). Objective tests like this one prevent the placement of too much discretion in the hands of the judiciary to approve race discrimination. *See* Brief Amicus Curiae of California Association of Scholars *et al.*, in *Fisher v. University of Texas*, No. 11-345 (filed May 29, 2012) (merits stage).

Opportunity (Oct. 17, 2006);[22] *see also* Part IIA, *supra*. One salutary by-product of making these presumptions explicit is that it will almost certainly discourage outsiders from attempting to influence admissions policies in the first place. That in turn could put colleges and universities on the road to winding down these preferences.

## CONCLUSION

To stop a train going downgrade, sometimes one needs to do more than simply apply the brakes. The ability to divert the train to a track with a flat or upward gradient can be of decisive importance. The kinds of counterweight presumptions that the CAS has suggested in this brief would help stop the higher education train as it speeds on the wrong track toward a twenty-fifth anniversary of *Grutter* marked by a permanent racial spoils system. They would instead help put the train back on the right track, moving toward the day when our nation's children will be truly judged on their merits, by the content of their character and not the color of their skin.

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[22] *Available at* http://www.ceousa.org/attachments/article/548/UM_UGRAD_final.pdf.

Respectfully submitted,

JOHN C. EASTMAN
*Counsel of Record*
ANTHONY T. CASO
CRISTEN A. WOHLGEMUTH
Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92886
(877) 855-3330
jeastman@chapman.edu

*Counsel for Amicus Curiae*
*California Association of Scholars*

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